Exhibit D

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: 11/20/2008
Time: 9:00 a.m.
Judge/Calendar: Hon. Chris Wickham

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

DAROLD R. J. STENSON,

Plaintiff,

v.

ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity); *et al.*,

Defendants.

No. 08-2-02080-8

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. RELIEF REQUESTED

Plaintiff Darold R. J. Stenson moves the Court under Washington Rule of Civil Procedure 65 for a preliminary injunction barring Defendants from carrying out his execution while this litigation remains pending.

II. STATEMENT OF FACTS AND EVIDENCE TO BE INTRODUCED

Mr. Stenson is incarcerated at the Washington State Penitentiary and has been sentenced to death. Mr. Stenson's execution was recently set for December 3, 2008.

Under Washington law, death sentences are carried out by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead." RCW § 10.95.180(1). An inmate may elect death by hanging. *Id.* The statute prescribes no specific drugs, dosages, drug combinations or the manner of intravenous line access to be used in the execution process. In addition, the statute fails to prescribe any certification, training, or licensure required for those individuals who participate in the execution process.

In April 2008, the United States Supreme Court decided *Baze v. Rees*, 553 U.S. __, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), in which the Court recognized for the first time that an inmate under a sentence of death can, under certain circumstances, prove that a state's lethal injection protocol violates the Eighth Amendment to the United States Constitution. *Baze* requires courts to conduct a fact-based review of lethal-injection challenges under the Eighth Amendment. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1556 (Stevens, J., concurring).[1]

[1] The Supreme Court recognized that the determination of whether a state's lethal injection protocol withstands constitutional scrutiny requires the trial court to conduct "extensive hearings" and fact-finding to determine the sufficiency of the evidence. *Id.* at 1526 (Roberts, C.J., plurality); *id.* at 1556 (Stevens, J., concurring). Chief Justice Roberts, writing the plurality opinion, phrased the

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Though the Supreme Court found that Kentucky's procedures for carrying out lethal injection survived constitutional scrutiny, the three-Justice plurality made clear that that determination was reached only after (1) requiring discovery of Kentucky's procedure, both as to its policy and how, in practice, Kentucky actually carried out lethal injection executions; (2) examining Kentucky's procedure and hearing factual and expert testimony, and (3) finding that Kentucky employed specific safeguards that minimized the risk of maladministration of the death-causing drugs. These safeguards included, for example, a minimum level of professional experience for individuals who insert intravenous ("IV") catheters, a requirement that the lethal injection team regularly practice, a requirement of backup IV lines and other redundancies, and the warden's presence in the execution chamber to watch for signs of consciousness and IV problems, and to redirect, as necessary, the flow of chemicals to the backup IV site if the inmate does not lose consciousness. *Id.* at 1533-34. Whether Washington's lethal injection statute, policy and procedures meet minimum constitutional requirements set forth in *Baze* has never been fully litigated in Washington, nor has the sufficiency of the same been tested against the Washington Constitution, which affords greater protections than its federal counterpart.[2]

Less than three weeks ago, on the eve of this Court's first scheduled hearing in this action and evidently in response to this litigation, Defendants hurriedly modified their execution policy (the twice such revision in the past sixteen months). DOC 490.200 ("2008 Policy"), filed as Attachment 1 to Reply to Resp. to Defs. Mot. to Dismiss ("Defs. Reply").

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inquiry as a determination of whether the "risk of pain from maladministration" of a lethal injection protocol constitutes cruel and unusual punishment under the Eighth Amendment. *Id.* at 1526.

[2] Washington's prohibition on "cruel punishment" found in Article I, § 14 of the Washington Constitution, provides greater protection than the Eighth Amendment to the United States Constitution. *E.g.*, *State v. Morin*, 100 Wn. App. 25, 995 P.2d 113 (2000), *review denied*, 142 Wn. 2d 1010, 16 P.3d 1264.

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Defendants followed no apparent administrative process, standards, or guidelines in implementing this amended policy. They cited no statute that authorizes their spontaneous policy modification. They gave no notice of their proposed modification—not to Mr. Stenson or to anyone else.

DOC's newest policy calls for the sequential administration of three drugs: sodium thiopental (a general anesthetic), followed by pancuronium bromide (a paralytic agent), followed by potassium chloride (a heart-attack-inducing agent). Other than identifying these drugs and the sequence in which they are administered, the 2008 Policy fails to establish requirements for critical components of how the execution process is to be carried out.

Mr. Stenson seeks an order enjoining Defendants from carrying out his execution so that the important and complicated constitutional issues raised by this lawsuit can be thoroughly and adequately reviewed by Washington courts.

III. STATEMENT OF THE ISSUE

The following issue is presented for resolution by the Court: whether the Court should grant Plaintiff's Motion for a Preliminary Injunction in order to undertake, for the first time, a thorough review of Washington's execution protocol in light of recent changes in federal Eighth Amendment jurisprudence and recent changes to DOC's execution policy and so that the constitutionality of the statute, policy and procedure can be tested under the Washington constitution as well.

IV. LEGAL AUTHORITY

Mr. Stenson seeks a preliminary injunction barring Defendants from carrying out his execution while this litigation remains pending. Unless this Court orders otherwise, his execution will occur before a final judgment is issued in this case.

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A. The Preliminary Injunction Standard

The purpose of a preliminary injunction is to preserve the status quo until the rights of the parties can be fully and fairly litigated. *McLean v. Smith*, 4 Wn. App. 394, 482 P.2d 798 (1971); RCW § 7.40.020. To grant Mr. Stenson an injunction, this Court must balance three factors: (1) whether he has a clear legal or equitable right; (2) whether he has a well grounded fear of immediate invasion of his right; and (3) whether Defendants' acts complained of will result in actual and substantial injury. *See, e.g., Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007). These factors must be balanced on a continuum, and the required showing of each factor varies "according to the circumstances of the particular case." *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936); *see also Independent Living Ctr. of S. Calif., Inc. v. Shewry*, 543 F.3d 1047, 1049 (9th Cir. 2008) (noting that "[i]njunctive relief is warranted when the party requesting such relief demonstrates some combination of probable success on the merits and the possibility of irreparable harm"); *Rabon v. City of Seattle*, 135 Wn. 2d 278, 284, 957 P.2d 621 (1998) ("[S]ince injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate.")

Mr. Stenson meets completely the second and third factors. If an injunction is not granted, he will be executed. Thus, the invasion of his right is as complete as it could be in any case. For the same reason, the third factor, "actual and substantial injury," is also certain. Thus, the only remaining factor to be considered is the likelihood of success on the merits. Given that the invasion of rights and injury factors are certain to occur without a preliminary injunction, the showing required for the likelihood of success on the merits is consequentially less.

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B. *Baze* and Other Cases Have Recognized the Necessity of Granting Preliminary Injunctions to Review State Lethal Injection Policy and Procedures

Baze began as a state court declaratory action challenging Kentucky's lethal injection protocols under state and federal constitutional provisions. In order to carefully consider the "substantial issue" of the "constitutionality of Kentucky's manner and means of effecting execution by lethal injection," the trial court granted a motion for temporary injunction barring the execution of the plaintiffs in that case. *Baze v. Rees*, No. 04-CI-1094, at 4 (Franklin Circuit Court, Nov. 23, 2004) (attached as Exhibit 1). Other courts have similarly issued preliminary injunctions or stays of executions in order to consider the constitutionality of execution protocol. *See Missouri v. Middleton*, No. SC80941 (Mo. Sept. 3, 2008) (attached as Exhibit 2); *Arizona v. Landrigan*, No. CR-90-0323-AP (Ariz. Oct. 11, 2007) (attached as Exhibit 3) (granting Jack Harold Jones's motion to stay execution); *Nooner v. Norris*, No. 5:06CV00110 (8th Cir. Oct. 11, 2007) (attached as Exhibit 4); *Cooey v. Taft*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached as Exhibit 5) (granting Romell Broom's motion for preliminary injunction and staying his execution) *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Aug. 26, 2008) (attached as Exhibit 6) (setting discovery deadlines and hearing for Kenneth Biros); *Jackson v. Taylor*, No. 06-300-SLR (D. Del. May 9, 2006) (attached as Exhibit 7) (granting Robert Jackson's motion for preliminary injunction); *Jackson v. Danberg*, No. 06-300-SLR (D. Del. June 27, 2008) (attached as Exhibit 8) (setting discovery deadlines and a hearing date).

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C. Consideration of the Three Preliminary Injunction Factors Establishes the Need for an Injunction in This Case

1. Mr. Stenson Is Likely to Succeed on the Merits

As part of deciding whether a party has a "clear legal or equitable right," this Court must examine the "likelihood that the moving party will prevail on the merits." *Rabon v. City of Seattle*, 135 Wn. 2d 278, 285, 957 P.2d 612, 623 (1998).

For at least five reasons, Mr. Stenson is likely to prevail on his claim that DOC's 2008 Policy is constitutionally inadequate under both the Washington and United States constitutions and that the DOC exceeded its authority under Washington law when it unilaterally promulgated its policy without pre- or post-enactment review: (1) contrary to the command of *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979), ***no*** procedural safeguards exist for promulgating or testing the constitutionality of this hastily-enacted policy; (2) the 2008 Policy, as written, violates Article I, § 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution; (3) the 2008 Policy, as carried out in practice, poses a significant and constitutionally intolerable risk of violating Article I, § 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution; (4) the due process clauses of the Washington and United States constitutions require that Mr. Stenson receive notice of precisely how Washington intends to execute him to ensure that the process does not run afoul of Article I, § 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution; and (5) no statute delegates to DOC the authority to establish and implement Washington's execution policy.

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a. The 2008 Policy, as written, violates the Washington and United States constitutions

Even a cursory comparison of Washington's 2008 Policy with the Kentucky's protocol examined in *Baze* confirms that the Policy contains few of the safeguards the Supreme Court relied on to uphold the Kentucky protocols. *See Baze*, 128 S. Ct. at 1537; *compare* 2008 Policy at 8-9 *with* 2004 Kentucky Execution Protocol and Revisions, attached as Exhibit 9.

Like Kentucky, Washington administers three drugs sequentially: sodium thiopental (a general anesthetic), followed by pancuronium bromide (a paralytic agent), followed by potassium chloride (a heart-attack-inducing agent). *Baze* acknowledged that maladministration of the first drug would cause constitutionally unacceptable risk of suffocation and pain: "*It is uncontested that failing a proper dose of sodium thiopental* that could render a person unconscious, *there is a substantial constitutionally unacceptable risk* of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 128 S. Ct. at 1533. The question then, is whether the state protocol contains sufficient safeguards such that there is not a substantial risk of maladministration. *Id.*

Unlike Kentucky, Washington lacks any substantial safeguards to prevent maladministration of the drugs and has no contingency plan for dealing with the known, foreseeable and serious complications that can arise during a lethal injection execution. For instance, the 2008 Policy does not require that a properly-trained individual monitor Mr. Stenson to ensure that he is properly sedated prior to the administration of the lethal chemicals pancuronium bromide and potassium chloride. Instead it generally provides that Superintendent, a person not required to possess any medical training, will "observe"

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Mr. Stenson "for signs of consciousness." 2008 Policy at 9. Moreover, the 2008 Policy does not account for the dangers of IV problems, including infiltration, nor provide for certain other protective redundancies that will ensure an adequate dose of sodium pentothal is delivered. If an insufficient dosage of sodium pentothal is delivered—a foreseeable occurrence given the inadequacy of the Policy—Mr. Stenson could regain consciousness and experience both conscious suffocation induced by pancuronium bromide and the excruciatingly painful burning sensation induced by potassium chloride. As the Supreme Court has explained, the risk of this occurring is constitutionally impermissible. *See Baze*, 128 S. Ct. at 1523.

Moreover, the Policy does not describe the manner and means by which DOC intends to access Mr. Stenson's veins. DOC concedes that its policy leaves it free to choose any method of IV access, including the highly invasive "cut down" procedure, *i.e.*, surgically exposing the vein, inserting a catheter and closing the skin with suturing. *See Nelson v. Campbell*, 541 U.S. 637, 641-42, 124 S. Ct. 2117, 158 L.Ed.2d 924 (2004) (describing cut down procedure and noting expert testimony that "the cut down is a dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation"). The use of the "cut down" procedure was challenged in *Baze*. During discovery, Kentucky agreed to remove this procedure from its protocol. *Baze v. Rees*, No. 04-CI-1094, at n.7 (Franklin Circuit Court, July 8, 2005); *see also Nelson*, 541 U.S. at 646 (noting that during oral argument the state agreed not to use the cut-down procedure unless actually necessary). The DOC implicitly conceded in its briefing on Defendants' Motion to Dismiss that the Policy does not bar this method of IV access or stipulate that, if used, a member of the execution team be medically qualified and capable of performing this painful surgical procedure. *See* Defs. Reply at 5.

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In addition, DOC appears free to insert the IV lines into the neck by use of the carotid artery or the jugular vein, a procedure found to cause "substantial and unnecessary risks" by the trial court in *Baze*.[3] *Baze v. Rees*, No. 04-CI-1094, at 8 (Franklin Cir. Ct., July 8, 2005).

The Policy gives no details on the flow of drugs through the lines, including whether and how long the injection team will wait before administering each subsequent chemical, or what happens if a malfunction occurs. It fails to describe how Washington will save Mr. Stenson's life if a last-minute stay is granted and does not require the presence of appropriate equipment or properly-trained personnel who can revive Mr. Stenson between administration of each drug should such a stay be granted.

Washington's Policy is plainly inadequate when compared to the protocols approved in *Baze*. As described below, these obvious deficiencies unnecessarily increase the risk that lethal injection, as administered, will cause Mr. Stenson to suffer unnecessary and severe pain.

b. The significant risk of maladministration of DOC's execution protocol violates the Washington and United States constitutions

Even if Washington's Policy was similar to the protocol examined by the United States Supreme Court in *Baze*—and it is not—there is an unacceptable likelihood that the Policy will be administered improperly and cause Mr. Stenson to suffer excruciating and constitutionally impermissible pain.

Baze requires courts to conduct a fact-based review of lethal-injection challenges under the Eighth Amendment. *Baze*, 128 S. Ct. at 1556. The numerous opinions making up the majority agree that "evidence adduced by [a] petitioner" will in certain circumstances render a state's protocol unconstitutional. *Id.* Similarly, the plurality observes that in the

[3] Kentucky did not challenge this finding of fact.

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absence of "extensive hearings," it will be difficult to determine whether the "risk of pain from maladministration" of lethal-injection protocols is sufficient to trigger Eighth Amendment protections. *Id.* at 1526 (Roberts, C.J., plurality).

The Court identified no less than seven safeguards that, taken together, caused the Court to rule that Kentucky's protocol avoided the risk that persons will suffer severe and unnecessary pain while being executed, including requiring experienced team members, regular practice, primary and backup IV lines, two sets of lethal injection drugs, precise timeframes for establishing IV lines, personal monitoring of the inmate's condition, and explicit alternative instructions in the event of the failure of the chemicals.

Because of the woeful lack of guidance provided in the written protocol and apparent absence of any other instructions, procedures or requirements to provide guidance and establish minimum standards, it is likely that DOC's application of the Policy, as applied, will create a substantial risk of severe and unnecessary pain. This is especially true where, as here, the protocol was just recently and hastily assembled and the DOC has had no time to assure that it can meet the few new requirements it has now included in the protocol. Further, as other courts have found when they actually required discovery and examined what was happening in practice, the actual practice did not mirror the written procedures. *See, e.g., Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N. D. Cal. 2006).

c. DOC exceeded its jurisdiction when it established and modified the execution policy without any review or oversight of their actions

Defendants' may not establish and implement a lethal injection policy (1) without a legislative grant of authority, (2) without standards or guidelines from the Legislature to guide their actions and (3) that permits no review or oversight of their actions. *In re Powell*, 92 Wn. 2d 882, 891, 602 P.2d 711 (1979). Washington law protects against precisely the

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"unnecessary and uncontrolled discretionary power" by administrative agencies that DOC exercised here. *Id.* In order for the legislature to permissibly delegate authority to a state administrative body, it must satisfy a two-part test:

> First, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it . . . . Second, adequate procedural safeguards must be provided, in regard to the Procedure for promulgation of the rules ***and for testing the constitutionality of the rules after promulgation.*** Such safeguards can ensure that administratively promulgated rules and standards are as a Subject to public scrutiny and judicial review as are standards established and statues passed by the legislature.

Id. at 891 (citation omitted; emphasis added). In *Powell* the court held that a legislative delegation of authority to the State Board of Pharmacy to promulgate emergency regulations without public notice was an unlawful delegation of authority.

Defendants' policymaking here meets no prong of the *Powell* test. First, there is no statute identifying DOC as "the administrative body" to establish and implement the procedures by which lethal injection will be administered. DOC's policy cites RCW §§ 10.95.160-190 as the sole authority for its power to establish and implement its policy. 2008 Policy at 2. But RCW § 10.95.180, which authorizes the two modes of execution permitted in this state, only provides that the superintendent will "supervise" the execution. Nor is there any statute providing "standards or guidelines"—even in "general terms"—about "what is to be done." *Powell*, 92 Wn. 2d at 891. RCW § 10.95.180 provides only that "[t]he punishment of death shall be supervised by the superintendent of the penitentiary . . ." and that the punishment "shall be carried out within the walls of the state penitentiary.[4] There is no express delegation to DOC, or to any administrative body, to

[4] RCW § 10.95.160 sets out procedures for trial courts to issue death warrants. RCW § 10.95.170 directs where and when a death sentenced prisoner shall be incarcerated. RCW

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establish execution procedures. There are certainly no standards or guidelines to direct the establishment or implementation of a policy.

Nor does DOC meet the second prong of the *Powell* test. RCW § 10.95.180 provides ***no safeguards***, much less "adequate procedural safeguards," for how to establish and implement execution procedures. *Powell*, 92 Wn.2d at 891. Nor has the Legislature provided adequate procedural safeguards "for testing the constitutionality of the policy" after promulgation. *Id.* To the contrary, DOC contends that review of its policy is impermissible. Where, as here, a state administrative body issues rules or policy (1) without an express delegation of authority, (2) without legislative guidance on standards and guidelines to be followed, and (3) ***with no mechanism for review***, that policy cannot be enforced. It is simply untenable that Defendants would so quickly rush to amend and modify a process that must meet state and federal constitutional standards ***without any review, oversight or process.***

d. Stenson has a due process right to discover if DOC's of execution protocols violates the Washington and United States constitutions

Because *Baze* requires a fact intensive inquiry, Mr. Stenson must have an opportunity to discover precisely how Washington intends to administer its execution Policy. *See, e.g., Stewart v. LaGrand*, 526 U.S. 115, 119, 119 S. Ct. 1018, 143 L.Ed.2d 196 (1999) (holding that inmates facing the death penalty are entitled to notice when there has been a post-conviction change in mode of execution).

The Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition on cruel and unusual punishment protect an inmate from being executed based on secret information. *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Simmons v. South*

§ 10.95.190 directs the persons permitted to attend executions and places specific limits on numbers of persons and timing for designating the same.

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Carolina, 512 U.S. 154 (1994). Surely, if an inmate cannot be sentenced to death based on secret information, then likewise, he cannot be executed under a secret procedure that the condemned inmate had no notice of or opportunity to challenge.

Mr. Stenson is not in a position to confirm that DOC has the safeguards required under the Eighth Amendment or the Washington Constitution to prevent severe and unnecessary pain. For instance, the Supreme Court acknowledged that an improper dose of sodium thiopental would create a "substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 128 S. Ct. at 1523. Nothing in the Policy or the documents received by plaintiff's counsel from DOC pursuant to a public disclosure request prevents this risk.

The most that can be discerned from reviewing Washington's protocols is that it omits many of the safeguards that salvaged Kentucky's protocols. Discovery will be necessary to determine whether Washington has supplemented its written policy with any informal or oral instruction or training that could provide the meaningful safeguards to reduce the risk of excruciating pain during the administration of lethal injection drugs.

2. Mr. Stenson Has a Well Grounded-Fear That Defendants Will Schedule and Carry Out His Execution

Mr. Stenson's execution has been set for December 3, 2008. He has a well-grounded fear that Defendants will carry out his execution if this Court does not enjoin them from doing so in order to consider the merits of this action.

3. If Defendants Schedule or Effect Stenson's Execution, He Will Suffer an Actual and Substantial Injury

Mr. Stenson will be executed if an injunction is not granted—quite possibly enduring excruciating agony. Any final judgment that DOC's Policy is constitutionally deficient

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would be rendered completely meaningless should Mr. Stenson be executed before judgment. Mr. Stenson will suffer the ultimate "actual and substantial" injury.

In order to preserve the parties' and the Court's ability to reach the merits of this claim without a pending execution lurking in the background, and to ensure that any final judgment is not rendered ineffectual by the irreparable injury of Mr. Stenson's execution, this Court should grant Mr. Stenson a preliminary injunction barring Defendants from carrying out Mr. Stenson's execution. *See Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) (recognizing that a prisoner facing execution will suffer irreparable injury if the stay is not granted). The hardship to the defendants if an injunction is granted is minimal.

D. The Public Interest In and Importance Of Evaluating the Constitutionality of the Policy Surpass Any Interest in Quickly Scheduling and Carrying Out Mr. Stenson's Execution

Granting Mr. Stenson a preliminary injunction barring Washington from carrying out his execution during the pendency of this litigation merely preserves the status quo for only as long as necessary to litigate the merits of Mr. Stenson's substantial claims.

Moreover, an injunction will do no harm to Defendants because if they prevail on the merits of the litigation, they will be able to execute Mr. Stenson as soon as they wish. All Mr. Stenson seeks is a death in "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

This is the first challenge focusing exclusively on lethal injection to be considered by Washington state courts since *Baze* was decided seven months ago. States confronted with challenges to the constitutionality of their execution protocols postponed executions to ensure that death sentences were not carried out in an unconstitutional manner. *See supra*, at

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4-5 (identifying cases in which courts stayed executions in order to consider the merits of similar lethal injection challenges). As the court observed in *Baze* when granting a preliminary injunction so the plaintiffs could pursue their lethal injection challenge: "The public interest is best served when the [state] presents and explains its position on the manner and means. Thereafter, the citizens of Kentucky can be assured that their government's duty and responsibility of enforcing a death sentence is being administered in a constitutionally proper manner." *Baze v. Rees*, No. 04-CI-1094, at n.7 (Franklin Circuit Court, Nov. 23, 2004).

This is an important issue that the courts of this state should address. If a preliminary injunction is not granted, Mr. Stenson will effectively be precluded from bringing this challenge, the DOC will continue to employ a constitutionally inadequate lethal injection policy, and Washington executions will continue to skirt the Eighth and Fourteenth Amendments, as well as the Washington Constitution. The Court should require that Defendants address the concerns raised by Mr. Stenson.

V. CONCLUSION

The factors that the Court considers in determining whether to issue a preliminary injunction weigh heavily in favor of granting an injunction in this matter. In order to give careful scrutiny to the constitutional claims presented, Mr. Stenson respectfully requests that this Court grant a preliminary injunction barring Defendants from scheduling or carrying out his execution until the conclusion of this litigation.

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DATED: November 13th, 2008

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CERTIFICATE OF SERVICE

On this the 13th day of November, 2008, I hereby caused a true and correct copy of the above foregoing document PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, NOTE FOR MOTION, and PROPOSED ORDER to be served by hand-delivery on the following counsel of record:

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Exhibit 1

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 04-CI-1094

RALPH BAZE
and
THOMAS C. BOWLING — PLAINTIFFS

v.

JOHN D. REES, Commissioner
Kentucky Department of Corrections
and
GLEN HAEBERLIN, Warden
Kentucky State Penitentiary
and
HON. ERNIE FLETCHER, Governor
Commonwealth of Kentucky — DEFENDANTS

ORDER AND OPINION

This matter is before the Court on Plaintiff's, Thomas Bowling, motion for a temporary injunction. The Plaintiff and Co-Plaintiff, Ralph Baze, have each been convicted of murder and have been sentenced to death under the laws of the Commonwealth. Plaintiff Bowling's execution by lethal injection is scheduled for November 30, 2004, under a warrant requested by the Attorney General on October 12, 2004, and signed by the Governor on November 8, 2004.

Bowling asks this Court for a temporary injunction barring his execution until his remaining claim in this pending case (filed August 9, 2004) is adjudicated. Plaintiffs'

remaining claim does not ask that their convictions or death sentences be set aside.[1] Rather, the claim challenges the Commonwealth's protocol for executions by lethal injection, saying it is inadequate, lacks appropriate safeguards and execution under the current protocol will subject them to cruel or unusual punishment, prohibited by the Kentucky and United States Constitutions.

The Defendants, the Commissioner of Corrections, the Kentucky State Penitentiary Warden, and the Governor of the Commonwealth, respond with a Motion for Summary Judgment saying there is no genuine issue of material fact which exists, CR 56.02, and the complaint fails to state a claim on which relief can be granted, CR 12.02(f). In sum, the Defendants are asking this Court to decide this case on its merits or lack of merit as found in the pleadings and proof already taken.

DISCUSSION

I. The Plaintiff's Motion for a Temporary Injunction

A temporary injunction is "an extraordinary remedy," tempered by the "equities of the situation," determined within the "sound discretion of the court," and by using the elements of CR 65.04. *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978). The Court of Appeals, in *Maupin*, said the application for temporary injunctive relief is viewed on three levels (a "three-part test," as restated by the Supreme Court in *Sturgeon Mining Company, Inc. v. Whymore Coal Company, Inc.*, Ky., 892 S.W.2d 591, 592 (1995)). The first level or predicate, also found in CR 65.04, is the showing of

[1] As of the date of this Order, Governor Fletcher has not signed a warrant of execution on the Plaintiff Ralph Baze.

irreparable harm.[2] The second predicate is weighing the equities involved. The last level requires that a "substantial question is at issue." *Maupin*, 575 S.W.2d at 699. The Court must find all three predicates before a temporary injunction will be issued.

The "clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur" before the determination of the matter in issue. *Id.* at 698. In this case the irreparable injury is death. Obviously a possible remedial final judgment, entered after the execution, is meaningless to the Plaintiff.

The second predicate involves equity. The Plaintiffs argue there is no detriment to the public interest; no harm to the Defendants and the injunction would merely maintain the status quo, not change the conviction or sentence. A brief delay, during which the status quo is maintained and necessitated by the need for this Court to consider this pending constitutional challenge, is not harm to the Commonwealth.

The United States Supreme Court, in the recently decided case of *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), recognized a challenge to a particular aspect of a state's lethal injection protocol under 42 U.S.C. §1983, but said "the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right." *Nelson*, 124 S.Ct. at 2125-26. More particularly the Supreme Court said, "[g]iven the State's significant interest in enforcing its criminal judgments there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 2126. This Court does not find that the Plaintiffs filed this action in order to delay

[2] CR 65.04 provides that a temporary injunction is authorized "if it is clearly shown...that the movant's rights are violated or will be violated...and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action."

the execution. Before the suit was filed both the Plaintiffs had requested the protocol through Open Records. When this suit was filed there was no signed death warrant and the Plaintiff's Petition for Writ of Certiorari to the United States Supreme Court was pending.[3] Prior to this action, the Commonwealth had never disclosed its manner or means for lethal injections even though this method of execution had been previously used.[4] Only during the recent discovery process has the protocol been disclosed and future discovery will reveal if the protocol has been in flux even after this action was filed.

As stated before, the ultimate issue is not if or when the execution will be administered or the method, but how. The public interest is best served when the Commonwealth presents and explains its position on the manner and means. Thereafter, the citizens of Kentucky can be assured that their government's duty and responsibility of enforcing a death sentence is being administered in a constitutionally proper manner. Equity favors the Plaintiffs.

While this Court will not presently render a decision on the merits of Plaintiffs' challenge to the protocol, the Court concludes that the last predicate of the *Maupin* test has been met. The substantial issue is the constitutionality of Kentucky's manner and means of effecting execution by lethal injection.

II. The Defendants' Motion for a Summary Judgment

Defendants' motion for summary Judgment requests this Court decide the matter on the pleadings and record as presented. Even on an expedited basis the requested

[3] The Petition for a Writ of Certiorari was denied October 4, 2004.
[4] Interestingly, a number of states' protocols are on the Internet or otherwise publicly available.

decision may possibly still be under consideration after the date scheduled for the Plaintiff's execution. Therefore, in addition to the reasons articulated above, the Defendants' motion for a summary judgment requires additional time past November 30.

CONCLUSION

Accordingly, Plaintiff Bowling's motion for a temporary injunction is GRANTED. The Defendant, Warden Glen Haeberlin, is enjoined from enforcing the Governor's order of execution of Plaintiff Thomas Bowling until the issue raised in the Plaintiffs' pleadings has been decided on its merits.

SO ORDERED, this 23 day of November 2004

Roger L. Crittenden, Judge
Franklin Circuit Court

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Exhibit 2

SUPREME COURT OF MISSOURI

en banc

September 3, 2008

STATE OF MISSOURI, Respondent,	)	
v.	)	No. SC80941
JOHN MIDDLETON, Appellant.	)	

ORDER

On the Court's own motion, execution stayed until the further order of the Court.

John C. Middleton, et al., Appellants, vs. Missouri Department of Corrections, et al., Respondents, No. WD69995, now pending in the Court of Appeals, Western District, is ordered transferred to this Court prior to opinion. *Mo. Const. article V, section 10.*

The expedited schedule for said case previously entered is vacated. In this Court, the record on appeal for said appeal shall be filed on or before September 12, 2008. Appellants' brief shall be filed on or before September 18, 2008. Respondents' brief shall be filed on or before October 1, 2008. Any reply brief shall be filed on or before October 6, 2008. Oral argument shall be held October 7, 2008.

Day - to - Day

LAURA DENVIR STITH
Chief Justice

Exhibit 3

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. JEFFREY TIMOTHY LANDRIGAN aka JEFFREY DALE PAGE, Appellant.	)	Arizona Supreme Court No. CR-90-0323-AP Maricopa County Superior Court No. CR-90-00066

O R D E R

On September 25, 2007, this Court issued a warrant of execution in the captioned case. On that same day, the United States Supreme Court granted certiorari in *Baze v. Rees*, No. 07-5439, 2007 WL 2075334 (Sept. 25, 2007), to consider whether the use of a lethal injection procedure to conduct an execution violates the Eighth Amendment to the United States Constitution.

Defendant filed a Motion to Stay Execution on September 28, 2007, contending that the United States Supreme Court's grant of certiorari review of one of the issues raised by Defendant, among other reasons, provides a basis sufficient to justify a stay of execution. The State has filed a response to that motion.

On October 4, 2007, Defendant filed a Petition for Post-Conviction Relief in the Maricopa County Superior Court, pursuant to Arizona Rule of Criminal Procedure 32. Defendant then filed his Second Supplement to Motion to Stay Landrigan's Execution with this Court on October 5, 2007.

The Court has considered all documents filed in this matter. Therefore,

IT IS ORDERED treating Defendant's October 5, 2007 Second Supplement to Motion to Stay Landrigan's Execution as an application for stay filed pursuant to Arizona Revised Statutes section 13-4234.J (2000 & Supp. 2006).

IT IS FURTHER ORDERED, in light of the grant of certiorari in *Baze v. Rees*, granting Defendant's application for stay of execution. The stay will remain in effect until further Order of this Court.

DATED this _____ day of October, 2007.

_____
Ruth V. McGregor
Chief Justice

TO:
Kent E Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office
Jon M Sands, Federal Public Defender's Office, Phoenix Office
Sylvia J Lett, Federal Public Defender's Office, Tucson Office
Jeffrey Timothy Landrigan, ADOC 82157, Arizona State Prison, Florence - Eyman Complex-SMU #2 Unit
Dale A Baich, Federal Public Defender's Office, Phoenix Office
Jennifer Bedier, Arizona Capital Representation Project
Diane Alessi, Capital Case Staff Attorney, Arizona Death Penalty Judicial Assistance Program
bh

Exhibit 4

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3165

Terrick Terrell Nooner and Don William Davis,

Jack Harold Jones Jr.,

Appellant

v.

Larry Norris, in his official capacity as Director, Arkansas Department of Correction, et al.,

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:06-cv-00110-SWW)

ORDER

Appellant, Jack Harold Jones's motion for a stay of execution is granted.

Judge Gruender would deny the motion. His dissent follows.

October 11, 2007

GRUENDER, Circuit Judge, dissenting.

I respectfully dissent from the grant of Jones's motion for stay of execution. Jones's unreasonable delay in bringing his § 1983 action creates a strong presumption against the grant of a stay, which he fails to overcome. Furthermore, I am not persuaded that the Supreme Court's grant of certiorari in *Baze v. Rees,* 217 S.W.3d 207 (Ky. 2006), *cert. granted*, --- U.S. ---, 2007 WL 2850507 (U.S. Oct. 3, 2007) (No. 07-5439), requires us to deviate from established precedent.

Jones intervened in a pending § 1983 action challenging Arkansas's lethal injection protocol as cruel and unusual in violation of the Eighth Amendment. Death row inmate Terrick Nooner originally filed this § 1983 action in the Eastern District of Arkansas on May 1, 2006. The district court allowed Jones to intervene on December 1, 2006. On August 21, 2007, Arkansas set Jones's execution date for October 16, 2007. Jones filed a motion for stay of execution, which the district court denied, in part because he had unreasonably delayed bringing his § 1983 claim. After the district court's decision, the Supreme Court granted certiorari in *Baze*, a § 1983 action that challenges Kentucky's lethal injection protocol, and a stay in *Turner v. Texas*, --- U.S. ---, 2007 WL 2803693 (2007), which challenges Texas's lethal injection protocol. Subsequently, Jones filed this motion for stay of execution.

Under the current law, "an inmate challenging a state's lethal injection protocol through a § 1983 action is not entitled to a stay of execution as a matter of course." *Nooner v. Norris*, 491 F.3d 804, 807-08 (8th Cir. 2007) (citing *Hill v. McDonough*, --- U.S. ---, 126 S. Ct. 2096, 2104 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649 (2004)). "[B]efore granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649-50. The Supreme Court further stated that "[g]iven the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650 (internal citations omitted).

Following our decision in *Nooner v. Norris*, 491 F.3d at 808-810, Jones is not entitled to a stay of execution because he unjustifiably delayed in bring his claim. Jones could have filed a § 1983 action challenging the constitutionality of Arkansas's lethal injection protocol anytime after 1997, when his sentence became final on direct review.[1] Because Jones could have brought his claim at such a time

[1] Arkansas adopted lethal injection as the primary method of execution in 1983. Recent changes to Arkansas's lethal injection protocol were made to bring it in line with the Missouri protocol as upheld in *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). These recent changes do not affect my conclusion that Jones

as to allow consideration of the merits without requiring entry of a stay, I would deny Jones's motion for stay of execution.

No precedent requires courts to stay all executions involving the same or similar issues to cases currently pending before the Supreme Court. *See, e.g., Alley v. Little*, 181 Fed. Appx. 509, 512 (6th Cir. 2006) (unpublished) (discussing whether the pendency of *Hill v. McDonough* before the Supreme Court should stay execution and ultimately finding that it did not); *Wilson v. Livingston*, 179 Fed. Appx. 228, 229 (5th Cir. 2006) (per curiam) (unpublished) (holding that the pendency of *Hill v. McDonough* should not stay execution because the court finds the motion dilatory), *petition for stay denied*, 547 U.S. 1125 (2006).[2] In *Zimmerman v. Johnson,* Justice Stevens wrote in dissent:

> Relying on Circuit precedent, the Court of Appeals for the Fifth Circuit affirmed the dismissal of the action on the procedural ground that § 1983 is not an appropriate vehicle for challenges to the method of execution . . . . [W]e have granted certiorari to review that precise procedural issue in another case. . . . I would postpone review of this case until *Nelson* has been decided and stay applicant's execution until that time.

540 U.S. 1087, 1087 (2003) (mem.) (Stevens, J. dissenting). Yet, this argument did not persuade the majority of the Supreme Court. *Id.* (denying application for stay of execution). In *Richardson v. Bowersox*, this court granted a stay of execution pending the Supreme Court's decision in *Penry v. Johnson,* 532 U.S. 782 (2001). 266 F.3d 939 (8th Cir. 2001). However, within hours, the Supreme Court vacated our stay of execution. *Luebbers v. Richardson*, 532 U.S. 915 (2001).

The Supreme Court "has not issued a nationwide stay of lethal injection executions until it hands down a decision in [*Baze*]." *Alley*, 181 Fed. Appx. at 512.

---

unreasonably delayed his challenge to Arkansas's lethal injection method of execution.

[2] This court has only once explicitly stayed execution because of a pending Supreme Court case on similar issues. *Chambers v. Bowersox*, 197 F.3d 308 (8th Cir. 1999). I do not believe that *Chambers* stands for the proposition that we are required to stay all executions in cases where similar claims are pending before the Supreme Court.

If the Supreme Court intends to stay all lethal injection executions, there is yet sufficient time for Jones to seek relief in the Supreme Court. However, until the Supreme Court announces an alternative rule, this court should follow binding precedent. *See Hines v. Johnson*, 83 Fed. Appx. 592, 592-93 (5th Cir. 2003) (per curium) (unpublished) ("We are keenly aware that the Supreme Court has under consideration the procedural question whether § 1983 is available as a vehicle for mounting attacks such as this; but until a different rule is announced, we continue to follow the procedure described by the district court."), *vacated on other grounds,* 543 U.S. 801 (2004).

For these reasons, I would affirm the district court's order denying Jones's motion to stay execution.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD COOEY, et al.,

Plaintiff,

v.

ROBERT TAFT, et al.,

Defendants.

Case No. 2:04-cv-1156
JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel

OPINION AND ORDER

Richard Cooey, a state prisoner sentenced to death by the State of Ohio, is the original plaintiff in a civil rights action pending before this Court that challenges multiple facets of the lethal injection protocol used by the State of Ohio. This matter is before the Court on the emergency motion of Romell Broom for a preliminary injunction or an order under the All Writs Act staying his execution, scheduled for October 18, 2007. (Doc. # 212.) For the reasons that follow, this Court finds the motion well taken. Thus, it is ORDERED, ADJUDGED, and DECREED that the State of Ohio and any person acting on its behalf are hereby **STAYED** from implementing an order for the execution of Romell Broom issued by any court of the State of Ohio until further Order from this Court.

On June 25, 2007, this Court issued an order granting Plaintiff Romell Broom permission to intervene. (Doc. # 203.) On June 6, 2007, at the State's request, the Supreme Court of Ohio set an execution date for Broom of October 18, 2007. (Doc. # 212-3, at 2.) Accordingly, Broom filed on June 29, 2007 the instant emergency motion for preliminary injunction, or at the very least for an order under the All Writs Act, to stay his execution. Also before the Court is the Defendants' memorandum in opposition. (Doc. # 215.)

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (quoting *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978)). The decision of whether to issue a preliminary injunction rests within the discretion of the district court. *See, e.g., N.A.A.C.P. v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir. 1989). In determining whether to exercise its discretion to grant a preliminary injunction, a district court must balance the following factors:

> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 459 (6th Cir. 1997) (en banc) (quoting *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995)). This Court finds that each factor favors Broom's request for a preliminary injunction, even after recent developments in this case that might, at first blush, suggest that the injunction should not issue.

On December 21, 2006, this Court issued an opinion and order granting Kenneth Biros's emergency motion for a preliminary injunction staying his execution. (Doc. # 151.) The Court incorporates that order by reference and attaches it for convenience. For purposes of the instant order, the most germane point to be taken from the Biros order is the Court's conclusion therein that the law of this case is that this Court should evaluate individually and on a case-by-case basis any motion for a preliminary injunction that comes before it.

Thus, in evaluating Broom's emergency motion for a preliminary injunction, the Court notes first that principles of equity weigh in Broom's favor, insofar as he was diligent in filing his motion to intervene and filing the instant emergency motion for a preliminary injunction. As noted above, this Court issued an order on June 25, 2007 granting Broom's request for permission to intervene in this action. (Doc. # 203.) Pursuant to the reasoning set forth in this Court's March 28, 2005 Opinion and Order (Doc. # 14), the statute of limitations on Broom's § 1983 claim did not begin to run until his execution became imminent (*i.e.*, when the United States Supreme Court declined to review his habeas corpus case or when the time for seeking United States Supreme Court review expired) and when he knew or had reason to know of the facts giving rise to his claim. On March 17, 2006, the Sixth Circuit affirmed the district court's decision denying Broom's habeas corpus petition, *Broom v. Mitchell*, 441 F.3d 392 (6th Cir. 2006), and on August 9, 2006, the Sixth Circuit rejected Broom's petition for a rehearing and suggestion for a rehearing *en banc*. On February 26, 2007, the United States Supreme Court denied Broom's petition for *certiorari*. Broom filed his motion to intervene in this case on April 25, 2007.

As Broom points out, when he filed his motion to intervene on April 25, 2007, he did not have an execution date. However, on June 6, 2007, the Ohio Supreme Court, at the State's request and even though provided with notice of Broom's motion to intervene in this case (Doc. # 212-2), scheduled Broom's execution by lethal injection for October 18, 2007. (Doc. # 212-3, at 1.) Broom filed the instant emergency motion for a preliminary injunction or an order under the All Writs Act, on June 29, 2007. Pursuant to this Court's construction of the statute of limitations, which remains in full force and effect despite the decision by the Sixth Circuit on

March 2, 2007 overruling this Court's construction of the statute of limitations for method-of-execution challenges raised under 42 U.S.C. § 1983, Broom proceeded in a timely and diligent manner.

On March 2, 2007, the Sixth Circuit issued a decision holding that the appropriate date for commencement of the limitations period for a § 1983 challenge on Eighth Amendment grounds to a state's execution protocol is upon conclusion of direct review of the death sentence in the state court or the expiration of time for seeking such review, and that the limitations period applicable to the instant action, (in connection with which Plaintiff-Intervenor Broom now seeks an order staying his execution), commenced no later than when the challenged protocol became Ohio's exclusive method of execution, *i.e.*, 2001. *Cooey v. Strickland*, 479 F.3d 412, 422 (6th Cir. 2007). Defendants insist in their memorandum in opposition that the decision compels a finding that Broom engaged in undue delay in bringing his Eighth Amendment challenge, thereby diminishing his right to the equitable remedy of a preliminary injunction staying his execution. (Doc. # 215, at 3-8.) Whatever effect that decision eventually has on this case, the most dramatic of which would compel its dismissal, it does not inform this Court's analysis of whether Broom proceeded in a timely and diligent manner when he filed his motion to intervene and subsequent motion for a preliminary injunction. Given the law that was in effect at all times relevant to Broom's pursuit to intervene in this case, by virtue of the fact that no mandate has issued on the Sixth Circuit's March 2, 2007 decision, this Court must conclude that Broom was timely in filing his motion to intervene in this case.

Returning to the four factors that this Court must evaluate and balance, *see McPherson*, 119 F.3d at 459, given the evidence that Jeffrey Hill first produced and that is now part of the

record; additional anecdotal evidence that Plaintiff-Intervenor Biros produced regarding the suspension of executions in Florida (Doc. # 149-9) and a finding by the Northern District of California that California's three-drug protocol violates the Eighth Amendment (Doc. # 149-10); and additional, more recent evidence that Broom has produced in the form of a research article published on April 24, 2007 raising questions about the efficacy of the three-drug protocol (Doc. # 212-6), the Court is satisfied that Broom has demonstrated at least as strong a likelihood of success on the merits as Biros before him. That the Sixth Circuit recently issued a decision overruling this Court's construction of the statute of limitations applicable to Cooey's challenge does not undermine the Court's conclusion on this factor.

The limited record before this Court reflects a growing body of evidence calling the lethal injection protocol like the one Ohio uses increasingly into question. This Court stated unequivocally in its order granting Hill's request for a preliminary injunction that it can not and will not turn a blind eye to the evidence presented in the cases of *Brown v. Beck* in North Carolina and *Morales v. Hickman* in California appearing to contradict the opinion of Dr. Mark Dershwitz that virtually all persons given the dose of sodium thiopental prescribed under Ohio's lethal-injection protocol would be rendered unconscious and would stop breathing within one minute. (Doc. # 45, at 6-9.) This Court reiterated that position when it granted Plaintiff-Intervenor Biros's request for a preliminary injunction, noting additionally that multiple states had, by that point, recently placed executions on hold due to serious concerns about various aspects of their respective lethal injection protocols. (Doc. # 11, at 7 n.5.) Broom has provided a research article published on April 24, 2007 questioning, among other things, whether any reliable medical research ever supported the formation of the three-drug protocol first devised by

Oklahoma and then essentially copied by every other state seeking to use lethal injection as a method of execution, whether the administration of the first drug, thiopental, is alone fatal or sufficient to anesthetize the inmate for the duration of the execution, and whether the administration of the third drug, potassium chloride, reliably induces cardiac arrest. (Doc. # 212-6.)

Of course, in determining whether Broom has established a strong likelihood of success on the merits, this Court would be remiss if it did not discuss the Sixth Circuit's aforementioned March 2, 2007 decision overruling this Court's construction of the statute of limitations for method-of-execution challenges raised under 42 U.S.C. § 1983. *Cooey v. Strickland*, 479 F.3d 412, 422 (6th Cir. 2007). Defendants argue in their memorandum in opposition that the Sixth Circuit's decision compels this Court to deny Broom's motion for a preliminary injunction. (Doc. # 215, at 8-9.) Ultimately that decision could require dismissal of this case[1] and that possibility would normally cut against Broom in his effort to demonstrate a strong likelihood of success on the merits. However, this Court is guided, if not bound, by the Sixth Circuit's own decision on March 19, 2007 not to vacate Plaintiff-Intervenor Biros's preliminary injunction in the wake of its March 2, 2007 decision overruling this Court's definition of the statute of limitations and directing this Court to dismiss the case. After the Sixth Circuit issued its March 2, 2007 decision directing the Court to dismiss this case, the State filed a motion asking the Sixth Circuit to vacate Biros's preliminary injunction so that his execution scheduled for March 20, 2007 could proceed. The Sixth Circuit declined, stating that Biros was an intervenor in the case

[1] On June 1, 2007, the Sixth Circuit issued an order denying the petition for rehearing and suggestion for rehearing *en banc*. (Doc. # 198.) On June 12, 2007, the Sixth Circuit issued an order staying its mandate to allow the appellee to file a petition for *certiorari* and continuing until the United States Supreme Court disposes of this case. (Doc. # 201.) That being so, the Sixth Circuit has not yet issued its mandate in this case.

who had joined in the petition for rehearing with suggestion for rehearing *en banc* that was still pending before the Sixth Circuit and that the State was free to renew its motion to vacate following the Sixth Circuit's resolution of that petition. (Doc. # 170-4, at 6.)

Guided by the Sixth Circuit's decision in this regard, this Court found on May 31, 2007 that Plaintiff-Intervenor Carter was entitled to the same–namely, the opportunity to continue litigating his Eighth Amendment challenge to Ohio's lethal injection protocol by way of the pending petition for rehearing with suggestion for rehearing *en banc*.[2] (Doc. # 197.) The very next day, however, the Sixth Circuit issued its decision denying the petition for rehearing and suggestion for rehearing *en banc*. (Doc. # 198.) Although that decision would appear to bolster Defendants' argument that Broom cannot demonstrate a substantial likelihood of success on the merits, two events subsequent to the Sixth Circuit's decision–actually, one event and one non-event–still compel a finding that Broom is entitled the opportunity to continue litigating his Eighth Amendment challenge to Ohio's lethal injection protocol. First, On June 12, 2007, the Sixth Circuit issued an order staying its mandate to allow the appellee to file a petition for *certiorari* and continuing until the United States Supreme Court disposes of the case. (Doc. # 201.) That the Sixth Circuit has not yet issued its mandate in this case and will not do so until such time as the United States Supreme Court disposes of this case conveys to this Court that the status quo reigns. *See* Doc. # 203 (discussing lack of mandate and law of the case). Further, to the extent that any argument could be made that the Sixth Circuit's June 1, 2007 decision

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[2] For the same reason–*i.e.*, the Sixth Circuit's March 19, 2007 decision denying the State's motion to vacate Biro's preliminary injunction–this Court is constrained to conclude that it is not bound by the Sixth Circuit's decision in *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007), reversing the district court's decision granting a preliminary injunction and finding, among other things, an "absence of any meaningful chance of success on the merits . . . ." *Id.* at 910.

denying the petition for rehearing and suggestion for rehearing en banc undermined this Court's rationale for having granted Carter's motion for a preliminary injunction staying his execution, as well as any subsequent motions for a preliminary injunction, it is curious that Defendants never appealed this Court's order granting Carter's stay.

Returning to the four factors set forth in *McPherson*, the Court concludes that the second factor also weighs in Broom's favor. The evidence that continues to mount calling multiple conclusions by Dr. Dershwitz into question also persuades this Court that there is an unacceptable and unnecessary risk that Broom will be irreparably harmed absent the injunction–in other words, that Broom could suffer unnecessary and excruciating pain while being executed in violation of his Eighth Amendment right not to be subjected to cruel and unusual punishment.

Regarding the third factor, the Court is not persuaded that issuance of the preliminary injunction will cause substantial harm to the State by comparison. Without diminishing in any way the State's significant interest in enforcing its criminal judgments in a timely fashion, it appears to this Court–even without a fully developed record–that the potential flaws identified in Ohio's lethal injection protocol giving rise to the unacceptable risk of violating the Eighth Amendment's proscription against cruel and unusual punishment are readily fixable. Thus, any delay in carrying out Broom's execution should and can be minimal. Any argument that the granting of an injunction would harm the State's interest in fulfilling the judgment against Broom in a timely manner is somewhat disingenuous, considering that but for the State's interlocutory appeal, many if not all of the underlying issues would in all likelihood have been resolved by now. The fact that the state-obtained stay has prevented such resolution qualifies the

weight to be afforded Defendants' asserted harm, because such harm is ultimately self-inflicted. Self-inflicted harm that could result from issuance of preliminary injunctive relief should not necessarily preclude an injunction. *Cf. Pappan Enter. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 806 (3d Cir. 1998) (holding in trademark infringement case that "a party's self-inflicted harm by choosing to stop its own performance under the contract and thus effectively terminating the agreement is outweighed by the immeasurable damage done to the franchiser of the mark"); *Midwest Guar. Bank v. Guaranty Bank*, 270 F. Supp. 2d 900, 924 (E.D. Mich. 2003) (holding that a party "cannot place itself in harms way, and then later claim that an injunction should not issue because of costs which it must incur in order to remedy its own misconduct").

In that regard, this Court hastens to reiterate that it is not penalizing Defendants for attempting to vindicate their defenses in the interlocutory appeal. But their request for the interlocutory appeal and the resulting stay in these proceedings are factors that must be weighed and, logically, they mitigate any assertion by Defendants of substantial harm stemming from the issuance of a preliminary injunction.

Finally, this Court is persuaded that the public interest only is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.

Defendants continue to emphasize, and this Court is mindful, that numerous other courts have denied motions for a preliminary injunction in cases raising the same or similar challenges. In the most recent cases cited by Defendants, however, the plaintiffs' undue delay in bringing their § 1983 actions was a factor weighing against them relative to the States' strong interest in

enforcing their criminal judgments. (Doc. # 215, at 5-6.) In *Nooner v. Davis*, 491 F.3d 804, 808-10 (8th Cir. 2007), and *Jones v. Allen*, 485 F.3d 635, 640 (11th Cir.), *cert. denied*, 127 S.Ct. 2160 (2007), the Eighth Circuit and Eleventh Circuit respectively found undue delay on the part of the applicants for bringing their Eighth Amendment method-of-execution challenges only after the conclusion or near-conclusion of collateral review. Given this Court's view about when Eighth Amendment challenges to the constitutionality of Ohio's lethal injection protocol are timely filed, and the fact that this Court's view in that regard continues to be the law in this case, this Court can only conclude that there has been no such delay on Broom's part.

Broom's motion for an emergency preliminary injunction is therefore **GRANTED**.[3] (Doc. # 212.) This Court declines to require a security bond. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (explaining that whether to require a bond is within the discretion of the court).

Thus, it is ORDERED, ADJUDGED, and DECREED that the State of Ohio and any person acting on its behalf are hereby STAYED from implementing an order for the execution of Romell Broom issued by any court of the State of Ohio until further Order from this Court.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

[3] Because this Court finds that Broom is entitled to a preliminary injunction staying his execution, it is not necessary to address Broom's alternative argument urging the Court to issue an order under the All Writs Act staying his execution.

Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD COOEY, et al.,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156
JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel

OPINION AND ORDER

This matter is before the Court pursuant to the Sixth Circuit's July 8, 2008 Order remanding the appeal of the preliminary injunction pertaining to Plaintiff Kenneth Biros. (Doc. # 278.) In that Order, the court of appeals concluded that "the question of whether the preliminary injunction should remain in effect following [*Baze v. Rees*, 128 S. Ct. 1520 (2008),] is an issue that should be addressed initially by the district court" and remanded so that this Court could consider whether the injunction "should be vacated in light of the *Baze* decision." (Doc. # 278, at 1-2.) The Sixth Circuit explained that the scope of the remand permitted this Court to "schedule whatever briefing and hearing schedules it deems necessary for consideration of this matter." (Doc. # 278, at 2.)

Arguably complicating this Court's actions upon remand is the fact that following the April 16, 2008 decision in *Baze*, the Sixth Circuit then issued the June 12, 2008 mandate related to *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Defendants have since moved for dismissal (Doc. # 295) of Biros' case under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Sixth Circuit's decision in *Cooey* requires dismissal of the 42 U.S.C. § 1983 claims asserted here based on the statute of limitations. Biros has filed a memorandum in

opposition to that motion (Doc. # 312), and Defendants have filed a reply memorandum (Doc. # 321).

The threshold issue is thus whether the remand permits the Court to consider only the effect, if any, of *Baze* on the injunction or whether it permits the Court to consider the effect of *Baze*, if any, within the context of the fact that the statute of limitations may have expired pursuant to *Cooey*. In other words, does the remand require this Court to pretend that Biros' case is not time barred (if it is) so that the Court can consider *Baze* issues that cannot apply to Biros if his claims are beyond the statute of limitations?

Logic demands that the answer to this question must be no. The appellate panel on the *Biros* remand consisted of Circuit Judges Suhrheinrich, Siler, and Gilman. These exact same judges constituted the appellate panel in *Cooey*. Although that latter panel was split in its decision, the inescapable conclusion is that these judges of course knew what they had done in *Cooey* when they issued the *Biros* remand and would not require this Court to analyze an injunction issued in a potentially time-barred case. Thus, the remand necessarily encompasses the preliminary issue of whether Biros has viable litigation to which *Baze* might apply. To conclude otherwise would charge the court of appeals with being unaware of what it is doing so that it is treating inconsistently litigants in the same district court proceeding who present the same core issues. Although this Court has certainly seen evidence of inconsistent treatment in this often curious litigation, it has not seen such treatment *by the same appellate panel*. The Court therefore concludes that the learned appellate judges must have intended for this Court to address Biros' injunction within the full context of whether *Baze* is relevant, which means that whether *Baze* even matters to Biros' claims is within the scope of the remand. If there is no

timely claim for Biros, as there was with Plaintiff Richard Cooey, then *Baze* does not matter. But if Biros has a timely claim, then *Baze* may matter a great deal.

This conclusion is necessarily limited to Biros. As the Court recently noted in its Opinion and Order[1] regarding the dismissal of Plaintiff Jeffrey Hill, the remand

> did not invalidate the *Cooey* statute of limitations and does not constitute on its face or implicitly instructions to conduct the factfinding Hill seeks on that issue. An inquiry under *Baze* focuses upon the merits of the § 1983 claims being advanced in this litigation, and the *Biros* remand permits this Court to reexamine the likelihood of success Biros has in light of the Supreme Court's recent decision.

(Doc. # 344, at 14.) Accordingly, having thus concluded that the Sixth Circuit intended for this Court to examine Biros and *Baze* in light of controlling precedent, this Court turns to the issue of whether Biros' claims are time barred so as to moot the potential application of *Baze*.

As noted, this Court previously issued an Opinion and Order in this litigation that discussed at length the Sixth Circuit's construction in *Cooey* of the statute of limitations for such § 1983 claims. (Doc. # 344.) This Court noted in that prior decision that *Cooey* teaches that § 1983 claims of the sort asserted in this case begin to accrue upon conclusion of direct review in the state courts and when a plaintiff knows or has reason to know about the act providing the basis of his or her injury. *Id.* at 422. Even in light of recent changes to the lethal injection protocol and the United States Supreme Court's issuance of *Baze*–which, as noted, pre-dated issuance of the *Cooey* mandate–the court of appeals issued *Cooey* as binding authority. This circuit authority reasons that a plaintiff knew or had reason to know about the act providing the basis of his or her injury when Ohio made lethal injection the exclusive method of execution in

[1] The Court adopts and incorporates herein the entirety of that decision and attaches it to the instant decision for ease of reference.

December 2001. Consequently, review of the motion to dismiss briefing and the record indicates that the following dates are relevant to the statute of limitations issue:

(1) Date of Biros's conviction and sentence: October 29, 1991.

(2) Date the Ohio Supreme Court affirmed Biros's conviction and sentence: May 14, 1997.

(3) Month in which the time for filing a petition for *certiorari* with the United States Supreme Court expired: August 1997.

(4) Date the Sixth Circuit has held inmates like Biros should have been aware of their § 1983 lethal injection protocol claims: December 2001, at the latest.

In light of the foregoing, this Court concludes that the rationale of *Cooey* does not render Biros' § 1983 claims untimely. The statute of limitations on these claims has therefore not expired. Regardless of whether (1) the Court exempts out of the limitations calculation the period when Biros was *not* under a sentence of death due to an initially successful habeas petition that ultimately failed (perhaps exempting as much as from December 13, 2002 to January 23, 2006) or (2) the Court holds that the limitations period did not even begin to run until reversal of Biros' habeas petition, the end result is the same: the two-year statute of limitation did not expire prior to Biros' October 18, 2006 motion to intervene.[2] (Doc. # 95.)

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[2] It is important to note that the Sixth Circuit explained in *Cooey* that an inmate such as Cooey (and therefore such as Biros) "should have known of his cause of action in 2001 after amendments to the law required that he be executed by lethal injection, and the information was publicly available upon request." *Cooey*, 479 F.3d at 422. Crediting that analysis, this Court calculates Biros' statute of limitations–assuming *arguendo* that it did not restart entirely following the reversal of his habeas petition–to have begun to run as of December 2001. This Court recognizes that the Cooey majority left open the door for an accrual date in 1993 for the knowledge component of the analysis, *id.*, but in the absence of guidance by the appellate court, this Court shall adhere to the date upon which the Sixth Circuit relied in *Cooey*.

Having concluded that Biros' § 1983 case survives the threshold statute of limitations challenge on the grounds discussed above, the Court need not and does not address his alternative arguments that the Court did not previously consider and reject in its attached and incorporated Opinion and Order. Thus, because Biros's assertion of his § 1983 claims is not time-barred, the Court must proceed under the remand to address the possible application of *Baze*.

Cognizant that the Sixth Circuit has instructed this Court to "schedule whatever briefing and hearing schedules it deems necessary for its consideration of this matter" (Doc. # 278, at 2), the Court therefore **ORDERS**:

(1) The Court **DENIES** Defendants' Motion to Dismiss. (Doc. # 295.)

(2) The Court deems it necessary under the remand order to schedule an in-court hearing beginning on December 15, 2008, at 9:00 a.m., on the application of *Baze* to the preliminary injunction. This hearing shall include the presentation of evidence, including testimony if any party so desires, and argument as to whether *Baze* proves dispositive of or otherwise informs to any extent the injunction issue. The parties should be prepared to address whether under a *Baze* inquiry Biros has a likelihood of success in this litigation so as to warrant continued injunctive relief.

(3) In order to facilitate this hearing, the Court orders that, by September 4, 2008 Defendants must turn over to counsel for Biros the entirety of its lethal injection protocol, including but not limited to all information related to the training and qualifications of all personnel involved in the execution process, as well as all techniques, practices, and equipment employed in the execution process.

(4) The parties shall identify their experts and all other witnesses by September 25, 2008.

(5) The parties should complete all depositions related to the in-court hearing by October 24, 2008.

(6) Biros shall file a brief in support of his preliminary injunction by November 14, 2008. Defendants shall file a memorandum in opposition by November 28, 2008. Biros shall file a reply memorandum by December 8, 2008.

(7) The parties are advised that failure to comply with the discovery contemplated in this Opinion and Order will result in the imposition of any applicable and appropriate potential sanction.

(8) In order to expedite discovery and avoid unnecessary delay, no party may file any motion related to discovery without first contacting the Court by telephone in order to schedule a status conference so that the Court can address the dispute directly and promptly.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

Exhibit 7

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT W. JACKSON, III.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 06-300-SLR
	)	
STANLEY W. TAYLOR, JR., THOMAS L. CARROLL, BUREAU CHIEF PAUL HOWARD, OTHER UNKNOWN STATE ACTORS RESPONSIBLE FOR AND PARTICIPATING IN THE CARRYING OUT OF PLAINTIFF'S EXECUTION,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

At Wilmington this 9th day of May, 2006, having reviewed plaintiff's complaint and motion for preliminary injunction, and having conferred with counsel;

IT IS ORDERED that, for the reasons that follow, the motion for preliminary injunction (D.I. 6) is **granted:**

1. Plaintiff Robert W. Jackson, III is scheduled to be executed on May 19, 2006. On May 8, 2006, he filed the above captioned action, pursuant to 42 U.S.C. § 1983, alleging that his execution under the likely protocol to be used by defendants would subject him to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (D.I. 2) Plaintiff also moved for discovery and for a preliminary injunction to enjoin the scheduled execution. (D.I. 5, 6)

2. During a May 8, 2006 telephone conference, the court expressed concerns over whether it had jurisdiction to consider plaintiff's claims on the merits in light of the case being considered by the United States Supreme Court in Hill v. McDonough, 05-8794, certiorari granted, 126 S.Ct. 1189 (Jan. 25, 2006).[1]

3. After conferring with counsel again on May 9, 2006, it was agreed that the Supreme Court's decision in Hill will have a dispositive effect on plaintiff's claims and that staying this litigation is the most prudent course of action.

4. It is anticipated that the Supreme Court will issue a decision in Hill before June 30, 2006. Therefore, the case is stayed until **July 24, 2006**, when the court shall conduct a telephonic status conference with the parties at **3:00 p.m.** Plaintiff's counsel shall initiate the call.

IT IS FURTHER ORDERED that defendants, and their agents, employees and contractors, are hereby enjoined from carrying out plaintiff's execution until further order of this

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[1]The questions before the Supreme Court are: (1) Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?; and (2) Whether, under [the Supreme Court's] decision in Nelson v. Campbell, 541 U.S. 637 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?.

court, as plaintiff has demonstrated, without opposition, that a preliminary injunction to maintain the status quo is warranted. United States v. Bell, 414 F.3d 474, 478 n.4 (3d Cir. 2005).

United States District Judge

Exhibit 8

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT W. JACKSON, III, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 06-300-SLR
	)	
CARL C. DANBERG, THOMAS L. CARROLL, PAUL HOWARD, OTHER UNKNOWN STATE ACTORS RESPONSIBLE FOR AND PARTICIPATING IN THE CARRYING OUT OF PLAINTIFF'S EXECUTION, all in their individual and official capacities,	)	**CLASS ACTION**
	)	
Defendants.	)	

ORDER

At Wilmington this 27th day of June, 2008, having conferred with counsel during the pretrial conference;

IT IS ORDERED that:

1. An evidentiary hearing is scheduled for **Wednesday, September 10, 2008** at **9:00 a.m.** in courtroom 6B, on the sixth floor of the J. Caleb Boggs Federal Building, 844 King Street, Wilmington, Delaware.

2. The court will start the proceeding by examining Drs. Heath and Dershwitz.

3. Each side will then be allotted 2 hours in total to conduct examinations of their witnesses and to cross examine opposing witnesses.

3. On or before **July 18, 2008**:

a. Defendants shall produce for the court's in camera review the complete and unredacted Delaware Execution Protocol, including all Attachments.

b. The parties shall confer and jointly produce for the court's review all discovery obtained by the parties, including deposition transcripts.

c. The parties shall identify the witnesses they will be calling for the September 10 evidentiary hearing, along with a proffer of their anticipated testimony.

United States District Judge

Exhibit 9

No. 07-5439

IN THE

Supreme Court of the United States

RALPH BAZE, et al,
Petitioners,

v.

JOHN D. REES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

JOINT APPENDIX
VOLUME IV

REDACTED VERSION FOR PUBLIC RECORD

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*Counsel of Record

PETITION FOR CERTIORARI FILED JULY 11, 2007
CERTIORARI GRANTED SEPTEMBER 25, 2007

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KENTUCKY STATE PENITENTIARY

VISITING SCHEDULE FOR DEATH ROW INMATE

PRE-EXECUTION (DEATH WATCH)

ATTORNEYS/PARALEGALS **REVISED 12/14/2004**

DAILY [redacted] TO [redacted] CONTACT

24-HOUR ACCESS IN EVENT OF EMERGENCIES

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DAY OF SCHEDULED EXECUTION [redacted] TO [redacted] CONTACT

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MONDAY THROUGH FRIDAY [redacted] TO [redacted]

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MONDAY THROUGH FRIDAY [redacted] TO [redacted] CONTACT

BY SPECIAL ARRANGEMENTS ONLY

VISITATION GUIDELINES

ANY ITEM BROUGHT IN BY ATTORNEYS/PARALEGALS, MINISTERS, OR NEWS MEDIA SUCH AS, BUT NOT LIMITED TO, CASSETTES, WIRELESS MIKES, BOOKS, OR MAIL MUST BE APPROVED IN ADVANCE BY THE WARDEN. NO ITEMS WILL BE ALLOWED IN BY PERSONAL VISITORS.

1. VISITS WILL BE CONDUCTED AT A DESIGNATED LOCATION.

2. NO MORE THAN FOUR VISITORS AT A TIME.

3. THE WARDEN RESERVES THE RIGHT TO DENY ACCESS TO THE INSTITUTION, ANY VISITOR OR PERSON, HE DEEMS A RISK TO THE SECURITY OF THE INSTITUTION.

REVISED 12/14/2004

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST

ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER

ACTIONS	RESPONSIBILITY	COMPLETED/DATE/TIME
1. Notify Department of Corrections [redacted] and [redacted] [redacted] of receipt of Governor's Death Warrant (immediately).	_____	_____
2. Begin a special section of condemned's medical record for all medical actions (X – 14 days).	_____	_____
3. Nurse visits and checks on the condemned each shift, seven days a week, using the special medical section to record contacts and observations (X - 14 days).	_____	_____

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PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER

REVISED 12/14/2004

ACTIONS	RESPONSIBILITY	COMPLETED/DATE/TIME
4. [redacted] personally observes and evaluates the condemned five (5) days per week, Monday through Friday (X - 14 days).		
5. Place the [redacted]s documentation in the permanent record immediately after personal contact.		
6. Department of Corrections [redacted] or his designee reviews and initials nursing documentation in #3 daily (X - 14 days).		
7. [redacted] reviews nursing and doctor's documentation weekly.		

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER

REVISED 12/14/2004

ACTIONS	RESPONSIBILITY	COMPLETED/DATE/TIME
8. Physical examination is completed by the [redacted] or his designee no later than seven (7) days prior to execution.		
9. Place the physical in the permanent medical record upon completion.		
10. [redacted]evaluation is completed by [redacted] no later than seven (7) days prior to execution.		
11. Place the psychiatric interview and psychiatric evaluation in the permanent medical record and send copies to the Warden.		

PRE-EXECUTION MEDICAL ACTIONS CHECKLIST
ACTIONS TAKEN AFTER RECEIVING EXECUTION ORDER

REVISED 12/14/2004

ACTIONS	RESPONSIBILITY	COMPLETED/DATE/TIME
12. [redacted] or his designee personally observes and evaluates the condemned's medical condition weekly.		
13. Place the [redacted] or his designee notes in the permanent record immediately after personal contact.		
14. Notify all medical staff to immediately notify the Warden, [redacted] or designee, and [redacted] of any change in the inmate's medical or psychiatric condition.		

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THE EXECUTION
LETHAL INJECTION

REVISED 12/14/2004

SEQUENCE OF EVENTS	**RESPONSIBILITY**	**COMPLETED/DATE/TIME**
1. At [redacted] the Warden orders the condemned escorted to the execution chamber and strapped to the gurney.		
2. The IV team members will be the members of the execution team who site and insert the IV lines.		
3. The team enters the chamber and runs the IV lines to the condemned inmate, site and insert one (1) primary IV line and one (1) backup IV line in a location deemed suitable by the team members.		
4. The insertion site of preference shall be the following order: arms, hands, ankles and/or feet, neck.		

REVISED 12/14/2004

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
5. To best assure that a needle is inserted properly into a vein, the IV team members should look for the presence of blood in the valve of the sited needle.		
6. If the IV team cannot secure one (1) or more sites within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date.		
7. The team will start a saline flow.		
8. The team will securely connect the electrodes of the cardiac monitor to the inmate and ensure the equipment is functioning.		

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REVISED 12/14/2004

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
9. The team will then move to the hallway and stand by.		
10. The team leader will recheck all restraints and determine they are secure and so advise the Warden.		
11. The Warden will confirm that all is ready.		
12. The Warden will make one final check with the attorneys stationed outside the chamber.		
13. The Deputy Warden will open the curtain and turn on the microphone.		

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REVISED 12/14/2004

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
14. The Warden states, "At this time we will carry out the legal execution of _____ (condemned name)."	_____	_____
15. The Warden asks the condemned if he wants to make a final statement (two (2) minutes allowed).	_____	_____

16. Upon the Warden's order to "proceed" and the microphone turned off, a designated team member will begin a rapid flow of lethal chemicals in the following order:

1) Sodium Thiopental (3 gm.)

NOTE: If it appears to the Warden That the condemned is not unconscious

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
within 60 seconds to his command to "proceed", the Warden shall stop the flow of Sodium Thiopental in the primary site and order that the backup IV be used with a new flow of Sodium Thiopental.		
2) Saline (25 mg.)		
3) Pancuronium Bromide (50 mg)		
4) Saline 25 (mg)		
5) Potassium Chloride (240 meq).		
17. A designated team member will begin a stopwatch once the lethal injections are complete. If the heart monitor does		

REVISED 12/14/2004

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
not indicate a flat line after ten (10) minutes and if during that time the physician and coroner are not able to pronounce death, the Warden will order a second set of lethal chemicals to be administered (Sodium Thiopental, Pancuronium Bormide, and Potassium Chloride). This process will continue until death has occurred.		
18. A designated team member will observe the heart monitor and advise the physician of cessation of electrical activity of the heart.		

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SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
19. The curtains shall be drawn when the Physician and coroner enter the chamber and confirm death by checking the condemned's pulse and pupils and so advise the Warden.	_____	_____
20. The curtain will then be opened. The Warden turns on the microphone and states: "At approximately ___ p.m. the execution of _____ was carried out in accordance with the laws of the Commonwealth of Kentucky".	_____	_____
21. The microphone is turned off and the curtains will be drawn.	_____	_____

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REVISED 12/14/2004

SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
22. The witnesses are escorted out of the witness room, first the media, inmate's witnesses, and then the victim's witnesses.		
23. The team will prepare the body for departure.		
24. Release body per prior arrangements.		
25. Funeral director completes death certificate.		
26. Not more than one (1) day after execution, the Warden shall return the copy of the judgment of the court pronouncing the death sentence, of the manner, time and place of its execution.		

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SEQUENCE OF EVENTS	RESPONSIBILITY	COMPLETED/DATE/TIME
27. Close out inmate account during next business day.		
28. Contact individual designated to receive condemned's personal property for pick up of property the next business day.		
29. Compile all documents pertaining to Execution and place in inmate file.		

EXECUTION TEAM QUALIFICATIONS

1. The following people with at least one year of professional experience may be on the IV team:
   a) Certified Medical Assistant, or
   b) Phlebotomist, or
   c) Emergency Medical Technician, or
   d) Paramedic, or
   e) Military Corpsman
2. Prior to participating in an actual execution, the member of the IV team must have participated in at least two (2) practices.
3. Members of the IV team must remain certified in their profession and must fulfill any continuing education requirements in their profession.
4. The execution team shall practice at least ten (10) times during the course of one (1) calendar year.
5. Each practice shall include a complete walk through of an execution including the siting of two (2) IVs into a volunteer.
6. Execution team members, excluding IV team members, must have participated in a minimum of two (2) practices prior to participating in an actual execution.

STABALIZATION PROCEDURE AFTER THE EXECUTION HAS COMMENCED

1. In the event that a stay is issued after the execution has commenced, the execution team will stand down and medical staff on site will attempt to stabilize the condemned with the below listed equipment and personnel.

   A. The Warden will arrange for an ambulance and staff to be present on institutional property.

   B. A medical crash cart and defibrillator shall be located in the execution building.